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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 68

DENNIS MANAFORD WHITNEY,

Petitioner,

v.

FLORIDA.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF FOR THE PETITIONER

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I.

Opinion Below

The opinion of the District Court of Appeal of Florida, Third District, dated March 8, 1966, re-hearing denied April 5, 1966, is reported at 184 So.2d 207 (R. 464, App. 33a). The petition for certiorari, filed in the Florida Supreme Court May 9, 1966 (R. 469, App. 38a), was denied without opinion on September 9, 1966, and is reported at 192 So.2d 490 (R. 478, App. 48a).

II.

Jurisdiction—Constitutional Provision Involved

The petition for certiorari to this Court, directed to the District Court of Appeal of Florida, Third District, filed October 26, 1966, under the rule that the computation of time from a decision of an intermediate state appellate court begins to run when the highest state court declines to exercise jurisdiction was granted on March 20, 1967 (R. 479, App. 49a). Jurisdiction is conferred upon this Court by 28 U.S.C., Section 1257 (3), since prejudicial pre-trial publicity deprived the defendant of a fair trial, as measured by the Due Process Clause of the Fourteenth Amendment, on the question of whether the jury would recommend mercy in their verdict.

III.

Questions of Law Presented

A. Is it a denial of due process for the state to deny a post-conviction evidentiary hearing in a capital case when the petitioner has alleged that extensive publication of his televised extra-judicial confessions together with other prejudicial pre-trial publicity deprived him of a fair trial on the question of whether the jury would recommend mercy?

B. Is it a denial of due process for the state to deny a post-conviction evidentiary hearing under the circumstances related above when the petitioner has alleged that he requested his court-appointed counsel to seek a change of venue but they refused to do so?

IV.

Statement of the Case

Defendant, at 17 years of age (R. 16) and indigent (R. 3), was arrested on March 5, 1960 (R. 40) for robbery and murder. Without being advised or otherwise knowing of his right to remain silent or his right to consult an attorney (R. 417, App. 1a) and without opportunity to discuss the problem with his family (R. 14, 313) he confessed the next day to six homicides and robberies and one attempted homicide which were committed in California, Arizona and Florida (R. 22, 311, 360). These confessions to the Dade County Sheriff were attended by the local press and were video-taped (R. 362, 387, 388) and extensively published by local television and radio stations (R. 187, 203, 211, 213) prior to his trial in June. There were also extensive newspaper reports of his confessions (R. 211, 213, 231, 232, 272). Counsel were appointed to represent defendant (R. 3) and were asked by defendant to move for a change of venue, but they did not do so (R. 418, App. 3a).

The murder trial was limited to a written stipulation of facts constituting murder in the first degree of the person in question, hereafter referred to as the judicial confession (R. 131-133), signed by the petitioner on the advice of his counsel (R. 395, 412) (who conceded the stipulation was equivalent to a plea of guilty (R. 391)), a recording of an extra-judicial confession of the murder in question played to the jury (R. 136) and one witness who established venue. Petitioner testified briefly as to his early environment (R. 139-148). The jury returned a verdict of guilty

without a recommendation of mercy, and he was sentenced to death (R. 86).

The assignments of error on appeal (R. 302), based primarily on the court finding the defendant sane, the sufficiency of the indictment and the prejudicial final argument of the state attorney to the jury, were rejected in *Whitney* v. *State,* 132 So.2d 599. A habeas corpus petition later filed in the Florida Supreme Court on the primary grounds that the defendant signed the judicial confession because of the guaranty by his counsel that his life would be spared (R. 441-443, App. 10a, 11a) was denied in *Whitney* v. *Cochran,* 152 So.2d 727, certiorari denied, 375 U.S. 888.

The defendant in proper person then filed a habeas corpus petition in the United States District Court alleging for the first time that adverse pre-trial publicity deprived him of a fair trial. This petition was denied on the grounds that the state court had not been given an opportunity to rule on the matter, after which the Fifth Circuit Court of Appeals stayed execution and suggested that the defendant present to the state courts the reasons now relied upon for reversal. *Whitney* v. *Wainwright,* 339 F.2d 275.

Petitioner then instituted a post-conviction collateral attack as provided for in Florida Criminal Procedure Rule I (App. 50a) (identical with 28 U.S.C. 2255) alleging *inter alia* (R. 417, App. 2a):

> 3) Petitioner's arrest, detention, pre-trial proceedings, and trial, received widespread adverse publicity by newspapers, radio and television, including broadcasts and telecasts of tape recorded confessions made by the Petitioner to law enforcement

agencies, to such an extent that such publicity prevented the selection of a fair and impartial jury on the question of whether the jury would recommend mercy for Petitioner in their verdict.

• • •

6) Trial counsel for the Petitioner, without authority from the Petitioner, or other justification: a) Refused to ask the Court for a change of venue though requested to do so by the Petitioner.

The trial judge, after ordering the state to respond (R. 426, App. 5a), denied relief without a hearing (R. 460, App. 30a) on the grounds contended by the state in its answer (R. 427-459, App. 6a-29a) that the appeal of the original conviction, *Whitney* v. *State*, 132 So.2d 599, and the earlier habeas corpus petition, *Whitney* v. *Cochran*, 152 So.2d 727, certiorari denied, 375 U.S. 888, were *res judicata* as to the issues raised. The Florida District Court of Appeal disagreed as to the applicability of *res judicata* but affirmed the trial court on the grounds that the publicity issue was not subject to a collateral attack because no motion for a change of venue was made, nor were the peremptory challenges exhausted (R. 464, App. 33a).

The petition for certiorari which was filed in the Florida Supreme Court (R. 469, App. 38a) was denied without opinion (R. 478, App. 48a).

V.

Summary of Argument

Rideau v. *Louisiana,* 373 U.S. 723, holds that pre-trial publication by television stations of motion pictures showing the defendant confessing to a murder is inherently invalid under the Due Process Clause of the Fourteenth Amendment. Here defendant's confessions to six unrelated homicides which were shown on television and published in the newspapers and radio deprived the defendant of the fair trial, to which the Florida law holds he is entitled, on the question of whether the jury would recommend mercy in their verdict.

The failure of counsel to move for a change of venue cannot foreclose the defendant from raising the publicity issue by collateral attack because state procedural laws of forfeiture must yield to federal substantive law, *Fay* v. *Noia,* 372 U.S. 391 and such failure violated minimum standards of trial advocacy. *Anders* v. *California,* 386 U.S. 738.

ARGUMENT

I.

Extensive Publication by Television and Other News Media of the Defendant's Confessions and Other Prejudicial Publicity Deprived Defendant of a Fair Trial on Whether the Jury Would Recommend Mercy.

A. Trial in a Locality Exposed to Defendant's Televised Extra-Judicial Confessions Brings This Case Within the Holding of *Rideau* v. *Louisiana.*

It is not disputed that the defendant's confessions of six unrelated homicides were recorded by television and radio (R. 362, 387, 388). The sufficiency of the allegation that publication of these confessions on television and radio and other widespread adverse publicity prevented the selection of an impartial jury on the question of whether the jury would recommend mercy (R. 418, App. 2a) has likewise never been questioned and is apparently substantiated by the record (R. 286, 187, 203, 211, 213, 231, 232, 272). The state further concedes that the allegation must be taken as true for purposes of determining whether a post-conviction evidentiary hearing is required (state's response to the petition, page 9).

The acts complained of cannot be distinguished from those condemned in *Rideau* v. *Louisiana,* 373 U.S. 723, 727.

> (W)e do not hesitate to hold, without pausing to examine a particularized transcript of the voir dire examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not

> seen and heard Rideau's televised "interview". "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death."

and described in *Estes* v. *Texas*, 381 U.S. 532, 538, as an inherent violation of the Due Process Clause of the Fourteenth Amendment.

> In Rideau v. State of Louisiana, 373 U.S. 723, this Court constructed a rule that the televising of a defendant in the act of confessing to a crime was inherently invalid under the Due Process Clause of the Fourteenth Amendment even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial.

The prejudice here is far greater than *Rideau*. In *Rideau* the jury had to determine the guilt or innocence of the defendant, and evidence of the defendant's innocence might have vitiated the effects of the publicity. Here the judicial confession took the question of guilt or innocence away from the jury, since it was conceded that the stipulation (R. 131-133) was in fact a judicial confession equivalent to a plea of guilty (R. 391). Trial counsel conceded the only issue in this case then was whether the jury would recommend mercy (R. 410).

It is inconceivable that anybody could receive a fair trial on the question of mercy in a city which was exposed to the defendant's public confessions of six unrelated homicides on television and radio and attendant comparable newspaper coverage. *Rideau* v. *Louisiana*, 373 U.S. 723, *Estes* v. *Texas*, 381 U.S. 532, *Sheppard* v. *Maxwell*,

384 U.S. 333, *Turner* v. *Louisiana*, 379 U.S. 466 and *Marshall* v. *United States*, 360 U.S. 310 all hold that prejudice need not be proven in situations where common sense dictates it can be assumed. The reason for this rule as it applies to television confessions has been adequately expressed in *Sheppard* v. *Maxwell*, 346 F.2d 707, 719 (6th Cir. 1965):

> To ask three jurors to put entirely aside the visual spectacle of a confession by the very defendant they are charged to presume innocent is indeed close to demanding the impossible. To believe that the balance of that jury could remain ignorant of what their fellow jurors knew would be folly.

The defendant has the right to a fair and impartial trial on the question of mercy just as he does in the determination of his guilt or innocence of the crime, *Grant* v. *State*, 194 So.2d 612 (Fla. 1967), *Pait* v. *State*, 112 So.2d 380 (Fla. 1959), *Singer* v. *State*, 109 So.2d 7 (Fla. 1959), and the jury must not be exposed to facts or arguments which are not properly a matter of record.[1]

Further the burden is on the state to show that the error complained of was harmless. *Chapman* v. *California*, 386 U.S. 18.

In any event, a system of justice which allows a sheriff to place a seventeen-year-old boy (R. 16), without opportunity to consult with counsel (R. 417, App. 1a) or family (R. 14, 313) on television to publicly confess his sins debases the dignity of man and ought not be tolerated in this country.

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[1] *Pait* v. *State*, 112 So.2d 380 (Fla. 1959); *Singer* v. *State*, 109 So.2d 7 (Fla. 1959).

B. Failure to Instruct the Jury That They Could Not Consider Matters Outside the Record in Their Deliberations on the Question of Mercy Emphasized the Effect of the Publicity.

Defense counsel did not request (R. 48-51), nor did the court give (R. 41-48) any specific instructions that the jury must disregard all knowledge they may have acquired about the defendant from the news media in their deliberations on the question of mercy. The court was nevertheless aware of the news coverage given the case, because it instructed the jury, when they were sequestered for the night, that they should not expose themselves to the publicity still attendant the case (R. 138). The terse general instruction that issues of fact must be based upon evidence in the record (R. 41) had no application in view of the judicial confession which left no issues of fact to decide and limited the jury's deliberations to the question of recommending mercy in their verdict (R. 410). The comments in *Irvin* v. *Doud*, 366 U.S. 717, 722

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U. S. 257; *Tumey* v. *Ohio*, 273 U. S. 510. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U. S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson* v. *City of Louisville*, 362 U. S. 199. This

is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds* v. *United States,* 98 U. S. 145, 155.

and *Sheppard* v. *Maxwell,* 384 U.S. 333, 351

Among these "legal procedures" is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in *Marshall* v. *United States,* 360 U. S. 310 (1959), we set aside a federal conviction where the jurors were exposed "through news accounts" to information that was not admitted at trial. We held that the prejudice from such material "may indeed be greater" than when it is part of the prosecution's evidence "for it is then not tempered by protective procedures." At 313. At the same time, we did not consider dispositive the statement of each juror "that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles." At 312. Likewise, in *Irvin* v. *Dowd,* 366 U. S. 717 (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside the conviction holding:

"With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion . . . ." At 728.

The undeviating rule of this Court was expressed by Mr. Justice Holmes over half a century ago in *Patterson* v. *Colorado*, 205 U. S. 454, 462 (1907):

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

Moreover, "the burden of showing essential unfairness . . . as a demonstrable reality," *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 281 (1942), need not be undertaken when television has exposed the community "repeatedly and in depth to the spectacle of [the accused] personally confessing in detail to the crimes with which he was later to be charged." *Rideau* v. *Louisiana*, 373 U. S. 723, 726 (1963).

apply equally well to the trial here on the question of mercy.

While a specific instruction from the court that the jury must disregard the "facts" obtained outside the courtroom in their deliberations on the question of mercy might not have cured what was otherwise an inherently unfair trial on the question of mercy, the failure to give such an instruction did insure the death penalty. The jury, not being advised to disregard the extra-judicial confessions of six unrelated homicides that appeared in the news media in their deliberations on the question of mercy, and not knowing any better, had no choice but to consider them and return the death penalty.

C. Failure to Present Psychiatric Witnesses, Who Reported Defendant Suffered From a Serious Mental Illness and Wanted Help, Emphasized the Effects of the Publicity.[1a]

The court-appointed psychiatrist reported to the trial judge (R. 18):

> There is marked evidence of serious personality disturbance in this background, and many of the features strongly suggest the psychopath. However, there is much concern with the meaning of his actions, wonder about his relationships to people and life, and confusion about his own feelings, with the emerging of paranoid suspiciousness, and other features which greatly suggest a more severe, schizophrenic process.

The opinions expressed by the psychiatrist at the pretrial sanity hearing reflect that defendant was not normal (R. 110) and that he wanted to be helped (R. 113). The psychiatrist further testified (R. 119-121):

> It would mean that if the process that I felt was emerging is actually present, then he would be tending more toward the psychotic type of disturbance, rather than the personality sort.
>
> • • •
>
> (D)espite the fact that there might be psychotic features and perhaps a psychotic process, I did not feel this had anything to do with his ability to distinguish right from wrong.
>
> • • •

[1a] Counsel's failure to present this testimony was raised in the Rule I petition (R. 419, App. 3a).

> I did find certain factors to indicate possible paranoid features, yes.

Certainly this evidence was again admissible in the defendant's trial before the jury on the question of mercy.

Moseley v. *New York*, —— N.E.2d ——, recently considered in a capital case the availability of psychiatric testimony at the sentencing hearing of an admittedly sane defendant and held such testimony admissible. The reason they expressed for the rule

> But there is no reason in logic or justice why the jury could not consider such evidence as a "mitigating" circumstance in fixing his penalty. An entirely different issue was involved at the sentencing proceeding—not the criminal responsibility of defendant which had already been decided under the traditional and arguably archaic McNaughton rule, but whether anything concerning the "defendant's background and history" might move the jury to extend mercy. On this issue, the conclusions of two of the psychiatrists (as supported by the defendant's conduct and his own testimony) that defendant was suffering from a grave mental illness which rendered it impossible for him to control his bestial actions would clearly have been relevant.

would apply equally well to the trial here on the question of mercy.

The consequences of this testimony cannot be calculated because the question of mercy is one solely in the province of the jury unfettered by any judicial standards. *Pait* v. *State*, 112 So.2d 380 (Fla. 1959). The failure to corrobo-

rate the defendant's testimony with the expert witnesses did insure the death penalty, however, because the jury, not knowing of the defendant's severe mental condition, had nothing on which to base a recommendation of mercy in view of the publicity given the attendant crimes.

Trial counsel realized (R. 391, 410) they were committed to the decision or strategy of pleading the client guilty to a capital crime and were obligated to exhaust every available tactic to protect their client on the question of mercy. Defendant has not waived his right to have these witnesses called in his behalf merely because he did not request that they testify, until it is shown he was aware he had such a right.[2] The only excuse for not presenting this testimony would appear to be the defendant's loss of the concluding closing argument to the jury (F.S. 918.09) which contention is shallow, but in any event there is no excuse for failing to discuss this psychiatric testimony with defendant.[3]

This case must be distinguished from the usual post-conviction collateral attack grounded on the failure to call defense witnesses. In all other cases the witnesses sought are supposedly material to the question of guilt or innocence, and the defendant reasonably could be assumed to know he had a right to call them and object at trial if they

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[2] *Johnson* v. *Zerbst*, 304 U.S. 458, 464, " 'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver * * * must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

[3] *Fay* v. *Noia*, 372 U.S. 391, 439. "A choice made by counsel not participated in by the petitioner does not automatically bar relief."

were not produced. Here the only question was whether the jury would recommend mercy, and the defendant cannot reasonably be expected to know that the psychiatric testimony was available to help him in that regard.

II.

Trial Counsel's Failure to Move for a Change of Venue or Exhaust the Peremptory Challenges Does Not Constitute a Waiver by the Defendant of Whether the Jury Was Fairly Constituted to Determine the Issue of Mercy.

A. Failure to Move for a Change of Venue or Exhaust Peremptory Challenges Cannot Be Imputed to Client Because Federal Substantive Law Must Take Precedence Over State Procedural Law.

The failure of the defendant to exhaust the peremptory challenges was relied upon throughout the appellate proceedings in *Sheppard* v. *Maxwell* and is discussed by the Ohio Court of Appeals, 128 N.E. 2d 471 at 481, the Ohio Supreme Court, 135 N.E. 2d 340 at 344 and noted by the United States Court of Appeals, 346 F.2d 707 at 714. The argument was extensively briefed on certiorari before this Court and rejected by this Court.

This Court has also refused to impute to a client the failure of trial counsel to elicit certain favorable testimony from a defense witness,[4] the failure of trial counsel to make an immediate objection,[5] and the entry of a plea of guilty by trial counsel.[6] These cases, all decided in situa-

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[4] *Townsend* v. *Sain*, 372 U.S. 293.

[5] *Henry* v. *Mississippi*, 379 U.S. 443.

[6] *Brookhart* v. *Janis*, 384 U.S. 1.

tions less critical than presented here, stand for the proposition that constitutional rights are not ordinarily waived by counsel without consultation with and participation by the client.

The reason for the rule is stated in *Fay* v. *Noia*, 372 U.S. 391, 426-434, that federal substantive law takes precedence over state procedural law of forfeitures,

> (W)e have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules plainly must yield to this over-riding federal policy • • • (D)ue process denied in the proceedings leading to the conviction is not restored just because the state court declines to adjudicate the claimed denial on the merits. 372 U.S. at 426, 427.

and in *Johnson* v. *Zerbst*, 304 U.S. 458, that waiver is an intentional relinquishment of a known right or privilege. The availability of a post-conviction collateral attack to test the constitutional defect is insured in *Townsend* v. *Sain*, 372 U.S. 293, 317.

> The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights *or was unaware of the significance of relevant facts*, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief. (Emphasis added.)

B. Counsel's Failure to Move for a Change of Venue Violated Minimum Standards of Trial Advocacy.

The American Bar Association's tentative draft of "Proposed Minimum Standards for Criminal Justice Relating to Fair Trial and Free Press", Section 3.2, Change of Venue or Continuance, and their "Proposed Standard Relating to Pleas of Guilty", Section 1.4, Defendant to be advised by Court, were both violated here. The recognition of these minimum standards together with the suggested procedure advocated hereafter will provide guidelines and leadership to the trial courts and raise the minimum standards by which adequate representation is now measured.[7]

The standard imposed on court-appointed appellate counsel in *Anders* v. *California*, 386 U.S. 738

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an *active* advocate in behalf of his client * * * (emphasis added)

a fortiori, is needed at the trial level. Such a standard, though necessarily broad, will provide more equal treatment of indigent defendants and protect the reputation of the bench and bar from attack of ineffective representation. The failure of counsel to move for a change of venue under the circumstances presented in this case and regardless of the presence or absence of any request by the client violated minimum standards of trial advocacy regardless of how broadly such a standard might be drawn.

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[7] See also the check list set out in the appendix to Report on Criminal Justice Act, 36 F.R.D. 277, 338.

The Court should further consider the right of the indigent defendant to instruct his court-appointed counsel as to the basic strategy of handling the trial during pre-trial proceedings. For counsel here were specifically requested by the defendant to move for a change of venue (R. 418, App. 3a). The responsibility of counsel here to move for a change of venue when requested by defendant is no less a duty than that imposed by the Court in *Entsminger* v. *Iowa,* 386 U.S. 748, which held that court-appointed appellate counsel could not take a partial appeal when a plenary appeal was requested by the client.

> (T)he attorney's function is to present alternative courses of action, not make decisions. The ultimate decision making is to be left to the client. Milligan v. State, 177 So.2d 75, 77 (Fla. 1965).

The importance of the failure to make this motion was demonstrated when the District Court of Appeal rejected the collateral attack for the sole reason that the motion was not made (R. 466, App. 35a).

Practically and realistically, under threat of retention of new counsel, private counsel, when requested to move for a change of venue, will either abide by his client's decision or convince him why the change should not be sought. The private attorney will withdraw if the client's decision is abhorrent to him. Court-appointed counsel is not concerned about losing the client and the fee, but like private counsel never should be obligated to advance any defense or argument in which he does not believe.

Counsel suggests the following procedure similar to that laid down last term in *Anders* v. *California* would allow court-appointed counsel to fulfil his professional obliga-

tion to himself, the trial court and the orderly administration of criminal justice and at the same time "afford the (indigent) that advocacy which a non-indigent defendant is able to obtain." *Anders* v. *California*, 386 U.S. 738.

If a conflict develops between the client and court-appointed trial counsel over pre-trial strategy, court-appointed trial counsel is obligated to either allow the client to control the decision or advise the trial court as to the conflict and offer the court as full an explanation as possible without prejudicing the client. After ascertaining that the client is aware of the possible consequences of his proposed action, the court can rule whether counsel should withdraw.

Under such procedure, regardless of whether new counsel is appointed, the trial record will reflect the procedure sought by the client and the client's rights will be preserved on appeal.

This is not to argue that the client should control the handling of the case at trial because there is a distinction between those decisions which must be made more or less instanter during trial and those decisions which can and should be made in the leisure of pre-trial proceedings. The overwhelming majority of decisions to be made at trial do not affect rights of a due process nature and can be controlled by counsel without prejudice in the constitutional sense, to the defendant. But pre-trial decisions often result in due process questions and their determination to a much greater extent is felt throughout the entire trial and appellate process. As to these, the client should be advised of the possible consequences attendant the available alternatives, so that he may instruct his counsel intelligently. Un-

fortunately, there are no easy decisions in the practice of criminal law and usually only a choice between decisions with the potential of equally harmful results.

It is impractical to expect court-appointed counsel to be as effective as privately retained counsel,[8] but due process is not satisfied unless the distinction between private and court-appointed counsel is minimized as much as practical.

Conclusion

The defendant is entitled to an evidentiary hearing to prove that his trial on the question of mercy was unfair, and to a new trial if such unfairness is substantiated by this record.

Respectfully submitted,

RICHARD KANNER
Attorney for Petitioner

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[8] Court-appointed counsel, because of the source of the fee, the volume of clients and inexperience ordinarily abandon the presumption of innocence doctrine and only defend indigents who are innocent, whereas private counsel require the state to be able to *prove* the guilt of their client.